No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE LINEN THREAD COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Prew Savoy, on behalf of the Linen Thread Company, Ltd., prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on May 15, 1942, and with respect to which a petition for Re-Hearing was denied June 19, 1942.

Opinions Below

The memorandum opinion of the United States Board of Tax Appeals (R. 24) not reported, is found in 1942 CCH, Par. 7032. The opinion on which it is

based, wherein is a dissent, is to be found in the Appeal of Aktiebolaget Separator, 45 B.T.A. 243. The opinion of the Circuit Court of Appeals (R. 39) is reported in 128 F.(2d) 166.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 15, 1942 (R. 44). Petition for Rehearing was filed June 12, 1942 (R. 46), was duly ordered received, and was denied June 19, 1942 (R. 51). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925.

Questions Presented

1. Did the maintenance by Petitioner, within the United States, in the tax years 1937 and 1938, of an office of the character and for the purposes disclosed in the record and found by the Board, bring it within the classification of a resident foreign corporation, as defined by Section 231 (b) of the Revenue Acts of 1936 and 1938, so that its taxable status was fixed by said Section 231 (b); or was it, despite the maintenance of such office, a non-resident corporation, within the meaning of Section 231 (a) and therefore taxable under such sub-section, because it was not engaged in trade or business other than as found by the Board?

2. Did the Circuit Court of Appeals correctly in-

terpret Section 231 of the Revenue Acts of 1936 and 1938, in its decision and its denial of the Petition for Rehearing, in view of Congressional action in interpretation of the provisions thereof?

Statutes and Regulations Involved

Revenue Act of 1938:

"Sec. 53. Time and Place for filing returns.

* * *

"(b) To Whom Return Made

* * *

"(2) Corporations.—Returns of corporations shall be made to the collector of the district in which is located the **principal place of business* or *principal office* or *agency* of the corporation, or if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland.

"Sec. 211. Tax on nonresident alien individuals.

"(b) *United States Business or Office.* — A nonresident alien individual engaged in trade or business in the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a). * * *"

"Sec. 231. Tax on Foreign Corporations.

"(a) Nonresident Corporations.—There shall

* Italics Supplied.

be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States **and* not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

"(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States **or* having an office or place of business therein shall be taxable as provided in section 14 (e) (1)."

* * *

Regulations 101 — (Revenue Act of 1938)

Article 231-1 (b) provides, in part, as follows:

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* Italics Supplied.

"Whether a foreign corporation has an 'office or place of business' within the United States depends upon the facts in a particular case. The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected."

The provisions of Section 231 of the Revenue Act of 1936 are substantially the same as the corresponding statutory provisions above quoted, and the pertinent part of Article 231 (b) of Regulations 94 is the same as the corresponding Regulations above quoted.

Statement

The Petitioner was incorporated under the laws of Scotland, with its manufacturing plants in Scotland and Ireland and its head office in Glasgow, Scotland. It holds large investments in the United States, Scotland and other foreign countries, and sells, in Scotland, its manufactured products to its *wholly-owned* American subsidiary, The Lenin Thread Co., Inc., a Delaware corporation.

The Petitioner filed Federal income tax returns on a calendar year basis, for each of the years 1937 and 1938 with the Collector of Internal Revenue for the Third District of New York. The returns were prepared in the United States by Petitioner's resident agent, were executed by the Petitioner's officers in Glasgow, and sent to the United States for filing with the Collector of Internal Revenue.

Tax withheld for 1937 exceeded Petitioner's tax liability as shown by its return for that year, and

Petitioner filed a claim for refund of the excess amount of tax withheld. The Petitioner paid an income tax for the year 1938 in the amount of $11,156.33.

William J. MacInnis was the resident agent of the Petitioner and held a power of attorney-in-fact for the Petitioner in the United States. For over thirty years prior to 1937, and not thereafter, he had been connected with the Petitioner's American subsidiary as salesman, factory manager, and vice-president. As Petitioner's resident agent, he received the dividends from the Petitioner's investments in the United States, consisting of shares of stock of the American Thread Co., United Shoe Machinery Corporation and The Linen Thread Co., Inc., and also the interest due Petitioner by its American subsidiary on indebtedness incurred in the purchase of goods in Scotland. Petitioner's Resident Agent deposits the money so received in a New York bank, maintains adequate bank balances for all purposes, pays the rent and taxes and all other expenses incident to Petitioner's "regular business" in the United States. He files all Federal and State tax returns, information returns, and the numerous reports required by the State of New York as well as the various bureaus of the United States. He keeps complete records of all income and expenses and has his books regularly audited, in addition to which he keeps his principal, the Petitioner, in Glasgow, informed regarding all information he can obtain pertaining to any changes in general business or its products which would affect Petitioner, such as the use of "nylon" as a substitute for thread, etc., etc.

The Petitioner does not engage in business, in the legal sense, other than as found by the Board, in the United States, and its activities in the United States are confined entirely to those above stated.

In 1937 Petitioner's resident agent had an office in the Central Hanover Bank Building, New York City, and in December, 1937, moved into the Chanin Building at 122 East 42nd Street, New York City, where he rents a room on a monthly basis, the lease naming Petitioner as tenant. During 1938 the resident agent maintained this office in the Chanin Building. The Petitioner employed no clerk or stenographer at this office, but called on the permanent staff of the owners of the building, maintained for this purpose, for such service, when required. The Petitioner's name appears on the office door, and in the New York City telephone book. The office is furnished, and a ledger, journal and cash book to record receipts and expenditures, are maintained there.

The Commissioner of Internal Revenue ruled that Petitioner was not a resident foreign corporation in 1937 and 1938, holding that Petitioner did not maintain an "office or place of business" in the United States, because it was not regularly engaged in trade or business in the United States, and asserted deficiencies in tax. The majority of the Board of Tax Appeals (in *Aktiebolaget, supra*) upheld the Commissioner, holding that maintaining an office or place of business requires the doing of trade or business or an intent to do so. The minority opinion of the Board dissented therefrom, on the ground that the statute sets up two distinct categories of resident for-

eign corporations; (1) those engaged in trade or business, and (2) those maintaining an office or place of business, and that the majority opinion confuses the two by in fact finding only one category in the statute; and on the further ground that on the facts in this case, holding petitioner to be a resident foreign corporation does no violence to the Regulations applicable. The Board followed the majority opinion in deciding the instant case. The Circuit Court of Appeals affirmed the decision of the Board, misapplying the regulations to the facts and misapplying the principle that weight is to be given the fact that departmental interpretation has not led to a change in the statute, in its decision and in its denial of the Petition for Rehearing.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that, because Petitioner was not engaged in trade or business within the United States and did not intend to do so, in 1937 and 1938, it was not a resident foreign corporation and taxable as such under Section 231 (b) of the Revenue Acts of 1936 and 1938.

2. In holding that, because Petitioner was not engaged in trade or business within the United States and did not intend to do so, in 1937 and 1938, it was a non-resident foreign corporation and taxable as such under Section 231 (a) of the Revenue Acts of 1936 and 1938.

3. In failing to hold that Petitioner, a foreign cor-

poration, maintaining an office within the United States under the circumstances appearing in the record and found as facts by the Board, is a resident foreign corporation and taxable as such under the provisions of Section 231 (b) of the Revenue Acts of 1936 and 1938.

4. In misapplying the applicable Regulations by holding in substance that Petitioner's office was a place where casual or incidental transactions were effected.

5. In misapplying the principle that the subsequent re-enactment of a statute unchanged amounts to an adoption of the Regulations in interpretation thereof.

6. In refusing to re-hear the case to consider Congressional interpretation of the Revenue Acts of 1936 and 1938 in pending legislation on the subject.

7. In affirming the decision of the Board of Tax Appeals.

Reasons for Granting the Writ

1. The case is of considerable importance to a large number of foreign corporations as is evidenced by the representations of the Treasury Department to the Committee on Ways and Means of the House, on June 5, 1942, in connection with H.R. 7378, now before the Senate Finance Committee (September 13, 1942):

> "The present law divides nonresident aliens and foreign corporations into two classes for income tax purposes.

"(a) Those not engaged in trade or business within the United States and not having an office or place of business therein; and

"(b) Those engaged in trade or business within the United States or having an office or place of business therein.

"Those falling in classification (a) are taxed generally at a flat rate upon the gross amount of dividends, interest, and other fixed or determinable annual, periodical income from sources within the United States and are not allowed any deductions or credits. Those falling within classification (b) are taxed generally under the same treatment accorded ordinary taxpayers and are entitled to deductions allocable to United States income and to appropriate credits. This provision has been abused principally by foreign corporations which hold substantial amounts of stock in domestic corporations. By establishing a nominal 'office or place of business in the United States' they can avoid the treatment accorded foreign countries as described above and thus secure deductions and credits.

*"*This amendment would require that in order to get this treatment a foreign corporation or nonresident alien must actually be engaged in trade or business within the United States.*"

There are a great many foreign corporations whose tax status will be affected by a determination of this

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* Italics Supplied.

question for the years 1936 through 1942, a question never previously before this Court. In view of the complexity of their problems in the United States as a result of the war, friendly foreign corporations should be given the maximum consideration by our highest Court, when a review of a general question not previously considered is sought.

2. The decision of the Circuit Court of Appeals herein, in the matter of the weight given Departmental Regulations, is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Magruder* v. *Wash. B. & A. R. Corp.*, 120 F. (2d) 441, cert. granted 314 U. S. 601, and the decision of this Court, in *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, and is erroneous.

3. The decision of the Court below is erroneous, for the following reasons:

(a) The activities of Petitioner within the United States—investments in operating companies—constituted part of the business for which Petitioner was organized — manufacturing *and investments.* See *Phillips* v. *International Salt Co.*, 274 U. S. 718; *Edwards* v. *Chile Copper Co.*, 270 U. S. 452.

(b) However, to fulfill the statutory requirement that it have an "office or place of business" in the United States, Petitioner was not required to do business. Congress had in mind at least two different kinds of resident foreign corporations (1) those engaged in trade or business, and (2) those having an office or place of business in the United States. If there are not two categories, one of which is not required to do business, the phrase "office or place of

business" is unnecessary and meaningless, as the term "engaged in trade or business" would cover every *quantum* of business. Congress is presumed to have used meaningful language and to have given meaning to all words in the statute. *Graham* v. *Goodcell*, 282 U. S. 409, *U. S.* v. *Updike*, 281 U. S. 489.

(c) A reading of Section 53 (b) and of Section 211 (b), *supra*, p. 3 in conjunction with Section 231 of the Revenue Acts of 1936 and 1938, requires the conclusion that there are three categories of foreign corporations required to file returns—(1) those engaged in trade or business; (2) those maintaining an office and (3) those maintaining a place of business. Only by such a conclusion can all parts of the statute be given full meaning. The Circuit Court of Appeals ignored the fundamental rule that every material part of a statute is to be read together. *Hellmich* v. *Hellman*, 276 U. S. 233/237; *Kohlsaat* v. *Murphy*, 96 U. S. 153/159; *U. S.* v. *Fisher*, 6 U. S. 358/386.

(d) The legislative history of Section 231 of the Revenue Act of 1936 — the Committee Reports, shows definitely that, where a foreign corporate taxpayer could be reached in this country, he would be compelled to file a return and pay the tax, but when he could not be reached, the tax would be withheld —the two systems of collection implementing one another. Petitioner was the very type of corporation which could be reached and was required to file a return under Section 231 (b). (House Report No. 2475 and Senate Report No. 2156 on H.R. 12395, 1936.)

(e) The holding sought by the Petitioner does not

do violence to the Regulations, since the requirement therein that business be regular and not casual relates only to the doing of business. However, if the Regulations do go further and require the doing of business, then they are contrary to the express language of the statute and are illegal. *Manhattan Co.* v. *Commissioner, supra.*

(f) The application in this case of the principle that Congress, by re-enacting the language of the 1936 Act in 1938 and thereafter, has approved the Departmental Regulations in interpretation thereof is wrong for two reasons. In the first place, Petitioner complains of the *Ruling* in its case—namely, that it must carry on some trade or business beyond that of handling investments, in order to qualify as a resident foreign corporation—not with the Regulations to the effect that any such business, or any business, must be regular and not just casual. (If the Regulations go beyond this, they are invalid. *Supra,* (e).) In the second place, it is evident from H.R. 7378 and from an examination of tax legislation since 1936 that Congress is now considering the language of Section 231 of the 1936 and 1938 Acts *for the first time since 1936,* and is for the first time considering striking out the words "office or place of business," and requiring the doing of trade or business to qualify as a resident foreign corporation. Where specific language is known to have been considered by Congress, there is basis for the principle applied herein. *Taft* v. *Commissioner,* 304 U. S. 351. But its general application, in the presence of hundreds of thousands of pages of Government Regulations annually—when the fact is *known* that Con-

gress has not considered the specific language involved—is beyond all reason. Particularly is this true, when some members of this Court know of their own knowledge that Congress can not be, and is not, familiar with Regulations and *Rulings*, except when they are brought to the specific attention of the Committees.

(g) The legislative history of H.R. 7378, as well as the Bill itself, constitute the interpretation by Congress of Section 231 of the Revenue Acts of 1936 and 1938. *U. S.* v. *Freeman*, 3 Howard 556; *Cope* v. *Cope*, 137 U. S. 682; *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286. That legislation and legislative history supports the conclusion that a foreign corporation, such as Petitioner, maintaining an office solely to look after its investments, is a *resident* foreign corporation, required to file a return under Section 231 (b) of the Revenue Acts of 1936 and 1938, and that the Circuit Court of Appeals erred in holding to the contrary.

Conclusion

It is respectfully submitted that this Petition should be granted.

PREW SAVOY,
Attorney for Petitioner.

September, 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 400

THE LINEN THREAD COMPANY, LTD., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 24–27) is unreported. The opinion of the Circuit Court of Appeals (R. 39–42) is reported in 128 F. 2d 166.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1942 (R. 43). Petition for rehearing (R. 44–48) was denied June 19, 1942 (R. 49). The petition for a writ of certiorari was

filed September 15, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner, a Scotch corporation, is taxable upon its 1937 and 1938 income as a resident corporation under subsection (b) of Section 231, Revenue Acts of 1936 and 1938, as contended by petitioner, or whether it is taxable as a nonresident corporation under subsection (a) thereof, as determined by the Commissioner and held by both the Board of Tax Appeals and the court below.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set ont in the Appendix, *infra*, pp. 9–12.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 25–27) may be summarized as follows:

Petitioner was incorporated under the laws of Scotland, with its manufacturing plants and head office in Glasgow, Scotland. It holds large investments in the United States, Scotland, and other foreign countries, and sells its manufactured products to its wholly owned American subsidiary, The Linen Thread Company, Inc., a Delaware corporation (R. 25–26).

Petitioner filed federal income tax returns on a calendar year basis, for each of the years 1937 and 1938, with the Collector of Internal Revenue for the Third District of New York. The returns were executed by petitioner's officers in Glasgow, and sent to the United States for filing with the Collector of Internal Revenue. A withholding tax return was filed for the year 1937 by the taxpayer's American subsidiary, The Linen Thread Company, Inc., which disclosed a tax withheld of $50,305.36 on payments made to petitioner. This tax was paid to the Collector of Internal Revenue at Newark, New Jersey, on March 15, 1938. A withholding tax return was filed for the year 1937 by the American Thread Company disclosing a withholding tax paid to the Collector of Internal Revenue for the Second District of New York of $253.86 on income paid to petitioner. For the year 1938 a withholding tax return was filed by the American Thread Company, disclosing a tax withheld for petitioner of $257.25 and paid to the Collector of Internal Revenue for the Second District of New York. Petitioner paid an income tax for the year 1938 in the amount of $11,156.33 (R. 26).

William J. MacInnis was the resident agent of petitioner and held a power of attorney-in-fact for petitioner in the United States. For over thirty years he had been connected with petitioner's

American subsidiary, as salesman, factory manager, and vice president.[1] As resident agent, he receives the dividends from petitioner's investments in the United States, consisting of shares of stock of the American Thread Company, United Shoe Machinery Corporation, and The Linen Thread Company, Inc., and also the interest due petitioner by its American subsidiary on indebtedness incurred in the purchase of goods in Scotland. Petitioner's resident agent deposits the money so received in a New York bank, pays the rent and taxes, and remits the balance to petitioner at Glasgow. He files federal and state tax returns, looks after petitioner's investments and any changes in the general business or in products or material which would affect petitioner, such as the new "nylon." Petitioner does not engage in business in the United States and its activities in the United States are confined entirely to those stated above (R. 26–27).

In 1937 petitioner's resident agent had an office in the Central Hanover Bank Building, New York City, and in December 1937 moved into the Chanin Building at 122 East 42d Street, New York City, where he rents a room on a monthly basis, the lease naming petitioner as tenant. During 1938

[1] Petitioner states (Pet. p. 6) that this connection terminated prior to 1937. The record does not show this to be so, nor does it show whether or not MacInnis is still employed by the American subsidiary.

the resident agent maintained this office in the Chanin Building. Petitioner employed no clerk or stenographer at this office, but called on the owners of the building for such service when required. Petitioner's name appears on the office door and in the New York City telephone book. The office is furnished, and a ledger, journal, and cash book, to record receipts and expenditures, are maintained there. There were never any official meetings of directors or officers of petitioner at the office in New York City, and no contracts of sale or other business activities were carried on there, but petitioner's managing director came to the office in 1937 and another director once stopped there en route from Australia to Scotland (R. 27).

The Commissioner held that petitioner was a nonresident foreign corporation, taxable as such, and determined deficiencies for the years 1937 and 1938 accordingly. Upon review, the Board of Tax Appeals sustained the Commissioner and the court below affirmed.

ARGUMENT

This case presents the same question as *Aktiebolaget Separator* v. *Commissioner,* 128 F. 2d 739 (C. C. A. 2d), certiorari denied, October 12, 1942, No. 309, present Term, and we submit that the instant petition should be denied for the same reasons as set forth in our brief in opposition in that case.

Petitioner refers (Pet. 9–10) to a statement purportedly made by the Treasury Department to

the House Committee on Ways and Means in connection with the 1942 revenue bill to the effect that under present law (Sec. 231 of the Revenue Acts of 1936 and 1938 and the Internal Revenue Code) foreign corporations can obtain classification as residents by establishing a nominal office or place of business in the United States. The statement is not included in the formal printed hearings of the Committee. Moreover, we are informed that it was not made by any representative of the Treasury Department, but that it appeared in an informal, unofficial memorandum prepared by someone not connected with the Treasury Department for the use of the members of the House Committee. The statement is inconsistent with the official regulations (Article 231–1 of Treasury Regulations 94 and 101, and Sec. 19.231–1 of Treasury Regulations 103). Furthermore, neither the House nor the Senate Finance Committee report (see Appendix) contains any such assertion with respect to the existing law, although counsel for petitioner urged the Senate Committee to incorporate such language in its report. Senate Hearings on H. R. 7378, 77th Cong., 2d sess., pp. 926–929. In the circumstances, that statement is entitled to no weight.[2]

[2] The statement in both the unofficial explanation relied on by petitioner and a portion of the Senate committee report (see Appendix) to the effect that under present law a foreign corporation may be regarded as resident even though it is not engaged in a trade or business in the United States, is consistent with the opinion below which recognized that to be the law (R. 41).

Petitioner asserts a conflict (Pet. 11) with *Magruder* v. *Washington, Baltimore & Annapolis R. Corp.*, 120 F. 2d 441 (C. C. A. 4th), and *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, but no such conflict exists. Neither case relates to the instant statute. Moreover, the *Washington, Baltimore & Annapolis R. Corp.* case, a capital stock tax case, was reversed by this Court, 316 U. S. 69, which approved the regulation there in question. The *Manhattan Co.* case stands for the proposition that regulations are not valid unless reasonable and consistent with the statute they purport to interpret; the instant decision is in harmony with that rule. Indeed the court below cited the decisions of this Court in both of those cases in support of its conclusion (R. 42) that the instant regulations are valid.

Section 53 (b) (2) of the Revenue Act of 1938,[5] to which petitioner alludes (Pet. 12), specifies the time and place for the filing of returns and contains nothing at variance with our position here.

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[5] SEC. 53. TIME AND PLACE FOR FILING RETURNS.

* * * * *

(b) *To Whom Return Made—*

* * * * *

(2) *Corporations.*—Returns of corporations shall be made to the collector of the district in which is located the principal place of business or principal office or agency of the corporation, or, if it has no principal place of business or principal office or agency in the United States, then to the collector at Baltimore, Maryland.

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
Special Assistants to the Attorney General.

OCTOBER 1942.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 231. TAX ON FOREIGN CORPORATION.

(a) *Nonresident Corporations.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, except that in the case of dividends the rate shall be 10 per centum, and except that in the case of corporations organized under the laws of a contiguous country such rate of 10 per centum with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

(b) *Resident Corporation.*—A foreign corporations engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsec-

tion (a), but the normal tax imposed by section 13 shall be at the rate of 22 per centum instead of at the rates provided in such section.

* * * * *

The like numbered provisions of the Revenue Act of 1938, c. 289, 52 Stat. 447, are substantially identical with the foregoing.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART., 231–1. *Taxation of foreign corporations.*—

* * * * *

(b) *Resident foreign corporations.*—

* * *

Whether a foreign corporation has an "office or place of business" within the United States depends upon the facts in a particular case. The term "office or place of business," however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

* * * * *

The corresponding provisions contained in Art. 231–1 of Regulations 101, promulgated under the Revenue Act of 1938, are substantially identical.

77th Cong., 2d Sess., House Report No. 2333, p. 103:

SECTION 207. APPLICATION OF EXCESS PROFITS TAX TO CERTAIN FOREIGN CORPORATIONS

Under existing law, nonresident aliens and foreign corporations are divided into two classes: (a) Those not engaged in trade or business within the United States and not

having an office or place of business therein and (b) those engaged in trade or business within the United States or having an office or place of business therein. Those in class (a) are taxed at a flat rate on fixed and determinable income while those in class (b) are subject to tax at the corporate rate applicable to domestic corporations.

A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations and, occasionally on the part of nonresident alien individuals, to attempt to establish that they have an "office or place of business" within the United States and hence secure the very different tax treatment accorded taxpayers within class (b). Since such corporations and individuals engage in no other economic activities in the United States, they cannot be said to be engaged in trade or business within the United States.

It appears to your committee to be in the interests of good administration to establish but one test (as is done with respect to capital-stock tax in sec. 1200) in ascertaining the classification of foreign entities, namely, whether or not it is engaged in trade or business within the United States. Such amendment narrows sharply the field of uncertainty arising in such cases and removes a possible avenue of tax avoidance to large foreign corporate and other holders of domestic securities.

Accordingly, section 143 amends sections 119 (a) (1), 143 (a) (1), 143 (b), 144, 204 (d), 211 (a) (1), 211 (b), 211 (c), 219, 231 (a), 231 (b) and 251 (e) relating to the tax imposed by chapter 1 by striking out "and not having an office or place of business

therein" or like clause wherever occurring therein. Similar changes are made applicable in section 207 to the excess profits tax imposed by chapter 2 of the code.

77th Cong., 2d Sess., Senate Report No. 1631, pp. 50–51, 135–136:

(pp. 50–51:)

NONRESIDENT ALIENS AND FOREIGN CORPORATIONS

Your committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corporations with respect to the income derived from sources within the United States. Under the present law, this privilege is extended to a nonresident alien individual or a foreign corporation which has an office or place of business in the United States, even though it may not be engaged in business therein. The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States.

(pp. 135–136:)

SECTION 211. APPLICATION OF EXCESS PROFITS TAX TO CERTAIN FOREIGN CORPORATIONS

Under existing law nonresident aliens and foreign corporations are divided into two

classes: (a) Those not engaged in trade or business within the United States and not having an office or place of business therein and (b) those engaged in trade or business within the United States or having an office or place of business therein. Those falling within classification (a) are generally taxed at a flat rate upon the gross amount of dividends, interest, and other fixed or determinable annual or periodical income from sources within the United States. Those falling within classification (b) are subject to tax at the rates generally applicable to individuals and domestic corporations, respectively, but only upon income from sources within the United States.

A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations and, occasionally on the part of nonresident alien individuals, to attempt to establish that they have an "office or place of business" within the United States and hence secure the very different tax treatment accorded taxpayers within class (b). Since such corporations and individuals engage in no other economic activities in the United States, they cannot be said to be engaged in trade or business within the United States.

It appears to your committee to be in the interests of good administration to establish but one test (as is done with respect to capital-stock tax in section 1200 of the Code) in ascertaining the classification of foreign entities, namely, whether or not it is engaged in trade or business within the United States. Such amendment narrows sharply the field of uncertainty arising in such cases and removes a possible avenue

of tax avoidance to large foreign corporate and other holders of domestic securities.

Accordingly, section 162, which corresponds to section 143 of the House bill, amends sections 14 (c), 119 (a) (1), 143 (a) (1), 143 (b), 144, 204 (d), 211 (a) (1), 211 (b), 211 (c), 219, 231 (a), 231 (b) and 251 (e) relating to the tax imposed by chapter 1 by striking out "and not having an office or place of business therein" or like clause wherever occurring therein. Similar changes are made applicable in section 211, which is identical with section 207 of the House bill, to the excess profits tax imposed by chapter 2 of the Code.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

THE LINEN THREAD COMPANY, LTD.,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Reasons for Granting the Writ

Respondent, in his Brief in Opposition, has avoided replying to the most basic reasons for granting the writ set forth in the Petition. (Pet. 9-14.) However, the argument of Respondent contains statements re-

specting the nature and effect of H. R. 7378 (at this date October 19, 1942, reported by the conferees), and of its legislative history (Resp. 5-6) which require this Reply. This is so, because H. R. 7378, the Revenue Act of 1942, and its legislative history provide the recognized grounds for the granting of the Petition herein.

1. The case is of considerable importance to a large number of foreign coporations.

In support thereof, Petitioner called attention to a document, printed by the Committe on Ways and Means of the House, June 5, 1942, and made public June 10, 1942, in connection with Section 162 of H. R 7378. (App. 15, Pet. 9-11.) This public document supports the assertion that *the question involved herein is of general importance.* (Pet. 10.)

Respondent has made no denial of this assertion in his brief, since it is a fact which the Treasury Department represented to Congress. This fact, the general importance of the question, in and of itself, will support the granting of the petition herein.

The argument which Respondent does make respecting this document and other legislative history of H. R. 7378, relates to another question and will be adverted to under "5," *infra.*

2. The decision of the Circuit Court of Appeals, in the matter of weight to be given Departmental Regulations, is in conflict with the decision of this Court in Manhattan Co. v. Commissioner, 297 U. S. 129, *and is therefore in error.*

In the *Manhattan Co.* case, this Court said that regulations are not valid unless reasonable and *consistent* with the statute they purport to interpret.

The statute involved herein provides that "a foreign corporation, engaged in trade or business within the United States, *or having an office or place of business therein,*" shall be taxable as a domestic corporation. (Sec. 231(b).)

Article 231 of Regulations 101 reads, in the part applied by the Court below:

> "The term 'office or place of business,' however, implies a *place for the regular transaction of business* and does not include a place where casual or incidental transactions might be, or are, effected."

The Treasury Regulations thus require that a foreign corporation be engaged in trade or business, in order to be treated like a domestic corporation, giving no real meaning to the term "having an office or place of business," and the Court below so held.

The Congress, considering the language of existing law *for the first time since 1936*, in H. R. 7378, has eliminated the words "having an office or place of business." In recommending that this be done, the Senate Finance Committee, in its Report No. 1631, pp. 50-51, (Oct. 2, 1942) said:

> "Your committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corpora-

> tions with respect to the income derived from sources within the United States. *Under the present law this privilege is extended to* a nonresident alien individual or *a foreign corporation which has an office or place of business in the United States, even though it May not be engaged in business therein.* The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. *With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States.*" (Italics supplied.)

Nothing the Committee might have said could have made clearer that, under the statute involved herein, Petitioner, maintaining an office within the United States, is to be treated as a domestic corporation for 1937 and 1938, even though it was not engaged in trade or business within the United States.

It is obvious therefrom—if not from just reading H. R. 7378 and Section 231 of the Revenue Acts of 1936 and 1938, and giving effective meaning to all of its words—that the Regulations limit the statute, *are inconsistent with it,* and for that reason, that the decision below is in conflict with the decision of this Court in *The Manhattan Co.* Case.

3. A reading of Section 53(b) of the Revenue Acts of 1936 and 1938 requires the conclusion that the Court below erred.

Respondent asserts that Section 53(b) contains nothing at variance with the decision below, as it specifies only the time and place for filing returns.

Section 43(b) specifies three (3) categories of corporations which shall file returns: (1) those engaged in trade or business; (2) those maintaining an office; and (3) those maintaining a place of business.

It is noteworthy that "office or place of business" is not one term. In fact "place of business" precedes "office." They are two categories. It is further to be noted that there is no confusion between (1) having an office and (2) being engaged in trade or business.

The decision below ignores the portent of this section, as does Respondent in his Brief in Opposition, by requiring that a foreign corporation shall be engaged in trade or business, in order to have an office, within the meaning of Section 231(b).

If section 53(b) and section 231(b) be read together, the decision below is obviously wrong.

4. Section 162 of H. R. 7378 and the legislative history thereof conclusively show that the principle of "legislative approval of regulations by subsequent re-enactment of statutory language" is not to be applied in this case.

The Court below held that the re-enactment of the similar language of Section 231 of the Revenue Act of 1936, in 1938 and in the adopting of the Code, constituted legislative approval of the regulations in interpretation thereof.

Petitioner asserted in the Petition to this Court, (supported by the hearings in Congress), that the Committees of Congress considered the language of Section 231 of the Revenue Acts of 1936 and 1938 *for the first time* in H. R. 7378, i. e., during this session of Congress, 1942. When it did so, *Congress changed the very language involved.* Respondent does not deny this fact.

Furthermore, the hearings and Committee reports show that, even in connection with H. R. 7378, the Treasury Department did not bring its regulations to the attention of the Committees of Congress. Respondent can not deny this fact.

Finally, the Senate Finance Committee, in its report (App. 15) said that, under existing law, the statute involved herein, a foreign corporation having an office or place of business within the United States (Petitioner) is to be treated as a domestic corporation, "even though it may not be engaged in business" in the United States.

Section 162 strikes out "having an office or place of business." What does this do? For the *future*, a foreign corporation must be engaged in trade or business within the United States, to be treated like a domestic corporation. Then previously, there must have been at least two categories of foreign corporations entitled to the same rights and privileges as domestic corporations. Yet, the regulations and the decision below in fact limit the statute to one category of foreign corporations—a corporation engaged in trade or business.

In adopting Section 162, the Senate Finance Com-

mittee carefully explained what it was doing, after hearings on the subject.

In these circumstances, and knowing all these facts, to apply the principle that subsequent re-enaction of this statutory language amounts to an approval of the departmental regulations in interpretation thereof is error.

When the facts respecting the proposed change in existing law came to the attention of Counsel for Petitioner, they were immediately called to the attention of the Court below by Petition for Rehearing. (R. 45.)

The petition was denied June 19, 1942, without waiting for the interpretation of the Senate Finance Committee, (October 2, 1942) *after* hearings, and pursuant to which the language quoted at page 4, *supra,* was written. Had the Court below had the Report of the Senate Finance Committee and the action of the House and Senate on the Bill, it is believed it would have changed its opinion accordingly and reversed its decision.

5. Subsequent legislation (H. R. 7378) on the same subject, changing the existing law, in the presence of the legislative interpretation of existing law, clearly shows that the decision below is erroneous and should be reversed.

Under date of June 5, 1942, the Treasury Department called the attention of the Ways and Means Committee of the House to the fact that foreign corporations, holding substantial amounts of stock in domestic corporations (Petitioner), having a nomi-

nal office, but not engaged in trade or business, (Petitioner) "can avoid the treatment afforded foreign corporations" under Section 231(a). This meant that such foreign corporations as Petitioner are to be treated like domestic corporations, under Section 231(b) of the Revenue Acts of 1936 and 1938, as Petitioner contends. It was recommended that the law be changed to limit to foreign corporations engaged in trade or business within the United States the right to be treated like domestic corporations.

Respondent says that the language of the document referred to was not included in the formal printed hearings and says it is informed that the document was not written by the Treasury Department.

The fact remains that it is a public document. It was not included in the printed hearings, because it was printed and published June 5, 1942, *after* the House hearings. Only the Treasury Department and the Counsel to the Joint Committee on Taxation were at that time before the Committee. Only the Treasury Department could have known the facts contained therein, and Treasury made the representations, whether or not its representatives did the manual writing. Respondent's argument in this respect is not frank.

While the statement relied upon by Petitioner is inconsistent with the Regulations, as Respondent insists, the fact is that the Regulations were not called to the attention of Congress. Indeed it is doubtful that the Committees of the House and Senate would have taken the time to change the law, had they been advised that, under the Regulations, it was not neces-

sary to change the law. Under the Regulations, a foreign corporation must be engaged in trade or business within the United States, to file returns in like manner as a domestic corporation. It would have, therefore, been unnecessary to change the law, had not Treasury made the representations contained in the document of June 5, 1942.

The Ways and Means Committee followed the recommendations contained in this document, *without hearings on the subject,* and the House followed the recommendations of its Committee, (H. R. 7378) and eliminated from existing law the words "having an office or place of business."

The Senate Finance Committee held hearings on the House Bill, at which Counsel for Petitioner appeared. (Hearings, pp. 924-929.) Respondent asserts there is no language respecting existing law in the Report of the Senate Finance Committee, although counsel urged such language. That is definitely not correct.

Counsel urged that no change be made in existing law, but in any event, if a change were made, that the Committee make the change prospectively and state in its report what change was being made in existing law. This is precisely what the Senate Finance Committee did.

After a vote of the full Finance Committee, announced by the Chairman to the press, the alternative request was agreed to, and the Committee stated the following in its report to the Senate (No. 1631, pp. 50-51):

> "Your Committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corporations with respect to the income derived from sources within the United States. Under the present law this privilege is extended to a nonresident alien individual or a foreign corporation which has an office or place of business in the United States, even though it may not be engaged in business therein. The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States."

The legislative history shows why the law is being changed and what the change in law means—namely, that being engaged in trade or business within the United States will *henceforth* be required, if a foreign corporation is to be treated like a domestic corporation. The change is being made because under existing law a foreign corporation owning stock of domestic corporations may merely maintain a nominal office and enjoy the same benefits, without being engaged in trade or business, i. e., Petitioner.

Petitioner urges that there is no ambiguity either in the existing law involved herein or in H. R. 7378, if meaning be given all words of existing law, and

that the Court below erred in limiting the statute in like manner as do the Regulations, and in rendering meaningless the words "or having an office or place of business therein, by denying a foreign corporation (Petitioner), having an office within the United States, the right to file federal income tax returns, even though it may not be engaged in trade or business therein.

It is only if the language of the statute is ambiguous or requires interpretation that resort should be had to regulations or to legislative history.

If the language of the statute is considered ambiguous, then certainly—when Congress makes a change in the statute and at the same time interprets existing law, particularly after it has been held that Congress has adopted regulations in conflict with such interpretation—the legislative interpretation of the prior law should be given great weight in determining the meaning of its language.

Great Northern R. Co. v. U. S., (Oct. Term, 1941 Dec. Feb. 2, 1942) 86 L. Ed. 446; *New York P. & N. R. Co. v. Peninsula Produce Exchange,* 240 U. S. 34; *Bowling v. United S.,* 233 U. S. 558; *Marchie Tiger v. Western Investment Co.,* 221 U. S. 286; *Cope v. Cope,* 137 U. S. 682; *Stockdale v. Atlantic Ins. Co.,* 87 U. S. 323; *U. S. v. Freeman,* 3 How. 556.

If this Court gives any weight to the interpretation of the Senate Finance Committee of Section 231(b) of the Revenue Acts of 1936 and 1938, and H. R. 7378, when the Committee knew that foreign corporations such as Petitioner, owning stock in domestic corporations, maintaining an office, but not

engaged in trade or business in the United States, were seeking to be treated as domestic corporations, under the law (Hearings, pp. 924-929) this Court must hold that the decision below was erroneous.

The decision below denies the Petitioner the right Congress sought to give and did give in 1936, (except for the Regulations), and now says it did give prior to H. R. 7378, and is now taking away as to the future only.

6. This case differs to some extent from AKTIEBOLAGET SEPARATOR v. COMMISSIONER, *128 F (2) 739 (cert, den. October 12, 1942); but if they are held not distinguishable, then the denial of the Petition for a Writ of Certiorari therein was wrong for the reasons "1" to "5",* SUPRA; *such denial should not prejudice the granting of the Petition herein, since reasons "1" to "5",* SUPRA, *were not brought to the attention of this Court in that case prior to the denial of the Writ.*

This case and the case of *Aktiebolaget Separator* differ in the following respects:

Petitioner maintained an office in a building different from that of its subsidiary, whereas the "office" of *Aktiebolaget* was in the suite of its subsidiary, which was the "Landlord."

Petitioner's office manager was an expert in the netting field, able to advise and advising the company respecting changes in products affecting the business, such as "nylon" and other such matters, and was not employed by the subsidiary. *Aktiebo-*

laget's representative continued in the primary employ of the subsidiary.

Thus, there might be some question as to whether *Aktiebolaget,* in fact, even maintained what might be termed an "office." There can be no question that Petitioner herein did maintain an office. (R. 26-27, 40-41.)

However, it is not necessary to the granting of the Petition herein that the case of Petitioner and the *Aktiebolaget* case be distinguished, for this Court did not have before it reasons "1" to "5", *supra,* in support of the Petition for the Writ of Certiorari therein.

An examination of the Petition in that case discloses that the Petitioner did not show from H. R. 7378 and its legislative history (1) that the question involved therein is of general importance and (2) that Congress, in enacting H. R. 7378, has interpreted the language of the statute involved to mean the opposite of the meaning given in the decision below and to mean precisely what Petitioner contends herein it does mean, so that the decision below is wrong and should be reversed.

In these circumstances, the denial of the Petition in the *Aktiebolaget* case should not prejudice the granting of the Petition herein.

Whatever may have been the action of the Court in such prior case, if the cases cited at page 11, *supra,* constitute existing law, and if H. R. 7378 and its legislative history, from the inception of Section 162 to date, be given the intended effect, the decision below is wrong and should be corrected by the

granting of the Petition herein and the reversal of the decision of the Circuit Court of Appeals.

There are so many friendly foreign corporations affected by the decision below that maximum consideration of the question involved, by our highest Court, is required.

Conclusion

Since this question is undeniably of general importance, and since the decision below is clearly contrary to the statute involved, as interpreted by Congress, and should be reversed, the Petition should be granted and the decision below reversed.

Respectfully submitted:

Prew Savoy

PREW SAVOY,
Attorney for Petitioner.

October, 1942.

APPENDIX

Page 1—Report of June 5, 1942:

"(CONFIDENTIAL COMMITTEE PRINT — UNREVISED)"

"MISCELLANEOUS
DATA ON PROPOSED
REVENUE BILL OF 1942

Submitted to the

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

No. 7

JUNE 5, 1942
F. Action on Technical and Administrative
Amendments—Continued

UNITED STATES
GOVERNMENT PRINTING OFFICE

72043-42 Washington: 1942"

Made public June 10, 1942.

Page 80—Report of June 5, 1942:

"The present law divides nonresident aliens and foreign corporations into two classes for income tax purposes.

(a) Those not engaged in trade or business within the United States and not having an office or place of business therein; and

(b) Those engaged in trade or business within the United States or having an office or place of business therein.

Those falling in classification (a) are taxed generally at a flat rate upon the gross amount of dividends, interest, and other fixed or determinable annual, periodical income from sources within the United States and are not allowed any deductions or credits. Those falling within classification (b) are taxed generally under the same treatment accorded ordinary taxpayers and are entitled to deductions allocable to United States income and to appropriate credits. This provision has been abused, principally by foreign corporations which hold substantial amounts of stock in domestic corporations. By establishing a nominal 'office or place of business in the United States' they can avoid the treatment accorded foreign countries as described above and thus secure deductions and credits.

This amendment would require that in order to get this treatment a foreign corporation or nonresident alien must actually be engaged in trade or business within the United States."

77th Congress, 2nd Sess.

H. R. 7378, "Sec. 162. *Aliens and Foreign Corporations Treated as Nonresidents.*

* * * * *

(d) Section 204 (d) (relating to deductions of foreign corporations), section 211 (b) (relating to nonresident alien individuals), section 231 (b) (relating to resident foreign corporations), and section 251 (e) (relating to deductions in the case of citizens and domestic corporations entitled to the benefits of section 251) are amended by striking out 'or having an office or place of business therein' wherever occurring therein."

Senate Report No. 1631, pp. 50-51, 135-136:

(pp. 50-51): "Nonresident Aliens and Foreign Corporations.

"Your committee have agreed to the House provision requiring a nonresident alien or a foreign corporation to be engaged in trade or business within the United States in order to be taxable like American citizens or domestic corporations with respect to the income derived from sources within the United States. Under the present law, this privilege is extended to a nonresident alien individual or a foreign corporation which has an office or place of business in the United States, even though it may not be engaged in business therein. The provision in the House bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue to apply even though such corporation is not engaged in trade or business within the United States."

(pp. 135-136):

"SECTION 162. ALIENS AND FOREIGN CORPORATIONS TREATED AS NONRESIDENTS

AND

SECTION 211. APPLICATION OF EXCESS PROFITS TAX TO CERTAIN FOREIGN CORPORATIONS.

"Under existing law nonresident aliens and foreign corporations are divided into two classes: (a) Those not engaged in trade or business within the United States and not having an office or place of business therein and (b) those engaged in trade or business within the United States or having an office or place of business therein. Those falling within classification (a) are generally taxed at a flat rate upon the gross amount of dividends, interest, and other fixed or determinable annual or periodical in-

come from sources within the United States. Those falling within classification (b) are subject to tax at the rates generally applicable to individuals and domestic corporations, respectively, but only upon income from sources within the United States.

A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations and, occasionally on the part of nonresident alien individuals, to attempt to establish that they have an 'office or place of business' within the United States and hence secure the very different tax treatment accorded taxpayers within class (b). Since such corporations and individuals engage in no other economic activities in the United States, they cannot be said to be engaged in trade or business within the United States.

It appears to your committee to be in the interests of good administration to establish but one test (as is done with respect to capital-stock tax in section 1200 of the Code) in ascertaining the classification of foreign entities, namely, whether or not it is engaged in trade or business within the United States. Such amendment narrows sharply the field of uncertainty arising in such cases and removes a possible avenue of tax avoidance to large foreign corporate and other holders of domestic securities.

Accordingly, section 162, which corresponds to section 143 of the House bill, amends sections 14 (c), 119 (a) (1), 143 (a) (1), 143 (b), 144, 204 (d), 211 (a) (1), 211 (b), 211 (c), 219, 231 (a), 231 (b) and 251 (e) relating to the tax imposed by chapter 1 by striking out 'and not having an office or place of business therein' or like clause wherever occurring therein. Similar changes are made applicable in section 211, which is identical with section 207 of the House bill, to the excess profits tax imposed by chapter 2 of the Code."